A

NASIR KENZIN & TAN

v.

ELEGANT GROUP SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
[CIVIL APPEAL NO: W-02-972-07]

C

31 OCTOBER 2008

CONTRACT: *Letter of undertaking - Breach - Solicitor's undertaking - Failure by solicitor to refund money held as stakeholder - Principles applicable - Triable issues - Summary judgment*

D

LEGAL PROFESSION: *Solicitors - Stakeholders - Letter of undertaking - Failure by solicitor to refund money held as stakeholder - Principles applicable - Triable issues - Summary judgment*

CIVIL PROCEDURE: *Summary judgment - Contract - Letter of*
E *undertaking - Failure by solicitor to refund money held as stakeholder - Principles applicable - Triable issues - Summary judgment*

The plaintiff/respondent, a company registered in Malaysia, had filed a writ action in the High Court against the defendant/
F appellant, a solicitor's firm, for an order, *inter alia*, that the latter do pay the respondent the sum of RM1 million, being money held by it as stakeholder's money together with accrued interests. The respondent had contracted to buy the issued share capital of a certain company from two registered and beneficial shareholders
G ('vendors'), who were represented by the appellant. Pursuant to the transaction the appellant, as solicitors for the vendors, issued an irrevocable letter of undertaking dated 4 December 2002 to the respondent. The respondent then terminated the sale and purchase of the company's shares and requested from the
H appellant the refund of the sum of RM1 million that was held by the appellant as stakeholders. The appellant failed to refund the sum resulting in the filing of the present case by the respondent. An application for leave to enter summary judgment under O. 14 r. 1 of the Rules of the High Court 1980 by the respondent was
I dismissed by the senior assistant registrar but, on appeal, was

allowed by the High Court judge. The senior assistant registrar's order was thereupon set aside and summary judgment was granted; hence, the present appeal by the appellant.

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The impugned undertaking was a promise or security given in the course of the arrangement, which bound the appellant in law, for obtaining some concession from the respondent. The promise required of the appellant was the return of that stakeholder sum to the respondent, in the event something shall happen or that something shall not happen, leading to the abortion or termination of the transaction of buying the shares of the company. The appellant's capacity when giving that undertaking was one of a professional *ie*, in the capacity of a solicitor, worthy enough to be entrusted with such a large sum of money. The seriousness of an undertaking cannot be underestimated, especially one given by a member of the legal profession, and unless compelled to honour the undertaking, public confidence and trust in the legal profession will whittle away. With the letter of undertaking dated 4 December 2002 so clear, unequivocal and unambiguous and the appellant having breached the solicitor's undertaking, there was no triable issue raised by the appellant. The non-refund of the RM1 million was a clear breach of the undertaking. That being so, with the facts and the antecedents as they were, this was a fit and proper case for summary judgment. (paras 13, 14, 15 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden, sebuah syarikat yang didaftar di Malaysia, telah memfail sesuatu tindakan writ dalam Mahkamah Tinggi terhadap defendan/perayu, sebuah firma peguamcara, untuk satu perintah, antara lain, bahawa yang kedua membayar responden duit sejumlah RM1 juta, iaitu duit yang dipegang olehnya sebagai duit pemegang amanah harta bersama dengan bunga terakru. Responden telah berkontrak untuk membeli modal syer sesuatu syarikat yang dikeluarkan dari dua pemegang syer berdaftar dan benefisial ('penjual'), yang diwakili oleh perayu. Meneruskan dari urus niaga tersebut perayu, sebagai peguamcara penjual, mengeluarkan sesuatu surat akujanji yang tidak boleh dibatal bertarikh 4 Disember 2002

A ke responden. Responden selepas itu menamatkan jual beli syer-syer syarikat tersebut dan meminta dari perayu bayaran balik jumlah RM1 juta yang dipegang oleh perayu sebagai pemegang amanah harta. Perayu gagal membayar balik jumlah tersebut mengakibatkan pemfailan kes ini oleh responden. Sesuatu
B permohonan untuk kebenaran bagi memperolehi penghakiman terus di bawah A. 14 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 oleh responden telah ditolak oleh penolong kanan pendaftar tetapi, di atas rayuan, telah dibenarkan oleh hakim Mahkamah Tinggi. Perintah penolong kanan pendaftar terus diketepikan dan
C penghakiman terus telah diberi; oleh itu, rayuan ini dibuat oleh perayu.

Diputuskan (menolak rayuan)

Oleh Suriyadi Halim Omar HMR menyampaikan
D **penghakiman mahkamah:**

(1) Akujanji yang disoalkan itu merupakan sesuatu janji atau sekuriti yang diberi di dalam perjalanan pengurusan tersebut, yang mengikat perayu dalam undang-undang, untuk
E memperolehi sesuatu konsesi dari responden. Janji yang diperlukan dari perayu ialah pemulangan jumlah pemegang harta amanah tersebut ke responden, malahan sesuatu akan berlaku ataupun bahawa sesuatu tidak akan berlaku, yang membawa kepada kegagalan atau penamatan urus niaga
F membeli syer-syer syarikat. Kapasiti perayu apabila menjamin akujanji tersebut merupakan sesuatu akujanji seseorang profesional, iaitu, kapasiti seseorang peguamcara, yang cukup berhak diamanahkan dengan satu jumlah besar duit. Keseriusan sesuatu akujanji tidak boleh dipandang rendah,
G terutamanya satu akujanji yang diberi oleh ahli profesion undang-undang, dan kecuali pemaksaan dibuat untuk menghormati akujanji tersebut, keyakinan dan kepercayaan awam akan menyusut. Memandangkan surat akujanji bertarikh 4 Disember 2002 yang begitu jelas sekali dan perayu
H melanggari akujanji peguamcara, tiada apa-apa isu yang perlu dibicara yang dibangkit oleh perayu. Ketidakbayaran balik RM1 juta tersebut merupakan pelanggaran ketara akujanji tersebut. Oleh itu, dengan fakta-fakta dan anteseden seperti itu, ini merupakan kes yang patut untuk penghakiman terus.

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Case(s) referred to:
Bhimji v. Chatwani (No 2) [1992] 1 WLR 1158 ***(refd)***
Guinness Anchor Marketing Sdn Bhd v. Chellam Joe Vetha Thya Singh [1999] 7 CLJ 392 HC ***(refd)***
In re A Solicitor; Ex Parte Hales [1907] 2 KB 539 ***(refd)***
Pernas Securities Sdn Bhd v. The Collector of Stamp Duties [1976] 2 MLJ 188 ***(refd)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
United Mining and Finance Corporation Ltd v. Becher [1910] 2 KB 296 ***(refd)***

Legislation referred to:
Partnership Act 1961, s. 11
Rules of the High Court 1980, O. 14 r. 1

Other source(s) referred to:
Halsbury's Law of England, 4th edn, vol 44, para 255

For the appellant - K Goik; M/s Nasir Kenzin & Tan
For the respondent - Jayne Koe (Dianne Ng with her); M/s Cheah Teh & Su

[Appeal from High Court, Kuala Lumpur; Summons No: S5-22-258-2005]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This panel unanimously had dismissed this appeal with costs and accordingly had affirmed the decision of the High Court. The deposit went towards account of taxed costs. In this case the plaintiff (hereinafter referred to as the respondent) had filed a writ action in the High Court at Kuala Lumpur against the defendant (hereinafter referred to as the appellant) for an order, *inter alia*, that the latter do pay the respondent the sum of RM1 million, being money held by it as stakeholder's money together with the accrued interests. Alternatively, the appellant was to pay the respondent damages in the sum of RM1 million together with interests. An application for leave to enter summary judgment under O. 14 r. 1 of the Rules of the High Court 1980 by the respondent was dismissed by the senior assistant registrar, but on appeal, the learned High Court Judge allowed it. The order of the senior assistant registrar was thereupon set aside and summary judgment was granted.

[2] The facts per the pleadings are as follows. The respondent is a company registered in Malaysia whilst the appellant is a solicitor's firm. The pleadings revealed that the respondent had contracted to buy the issued share capital of a company known as Sparkling Gateway Sdn Bhd. from the two registered and beneficial shareholders, namely Wong Soon Kin and Wong Yoke Ken (hereinafter referred to as the vendors). These two persons were represented by the appellant. Pursuant to the transaction the appellant, as solicitors for the vendors issued an irrevocable letter of undertaking dated 4 December 2002, complete with the firm's letterhead and correct address, to the respondent. The material terms of the letter of undertaking reads as follows:

> In consideration of you agreeing at our clients request to pay the sum of RM1,000,000.00 to us as stakeholders, we as the Solicitors for Wong Soon Kin (NRIC No: 610525-10-6755) and Wong Yoke Ken (NRIC No: 581110-10-6630) hereby agree to hold the sum of RM1,000,000.00 paid by you to us as stakeholders and to **irrevocably undertake to refund the said sum of RM1,000,000.00** paid by you to us aforesaid together with all accrued interest thereon in the event of and upon the abortion or termination of the sale and purchase of all the issued shared capital of Sparkling Gateway Sdn Bhd by you from our client **for any reason whatsoever** irrespective of whether there is any dispute as to whether the said sale and purchase has been lawfully aborted or terminated or otherwise, within seven (7) days of our receipt of a notice requesting for such refund either from you or from solicitors acting on your behalf (emphasis added).

[3] Initially everything went well, until come a letter dated 15 April 2003 issued by the respondent's former solicitors, Messrs Nily Ting & Co to the appellant firm, stating that the respondent had terminated the sale and purchase of the shares of the company. This letter was followed by another, dated 21 April 2003, requesting from the firm for the refund of the abovementioned sum of RM1 million, held by the appellant as stakeholders.

[4] Regretfully in breach of the letter of undertaking, the appellant had failed to refund the said sum hence the subsequent filing of the case against it. The respondent's claim against the appellant was simple and straight forward. All it wanted was the sum of money pursuant to the undertaking, which the appellant had failed to pay up, despite a request having been made for it.

[5] The defence of the appellant was rather brief in that it was not responsible to refund the abovementioned sum as it was meant for some renovation repayment money. One of the conditions of the transaction was that the respondent was required to complete the transaction of the immoveable property but regretfully reneged by the respondent. Due to that breach the appellant had received instruction not to hand over the stakeholder sum to the respondent, any contravention of which will lead to a suit being filed against it by the vendors.

[6] In a nutshell a perusal of the defence showed that the appellant had totally ignored the undertaking made on 4 December 2002 but had submitted some unusual argument about some immoveable property on a piece of land which needed renovation; and that RM1 million was for its costs. The respondent thereafter filed an O. 14 action against the appellant, and in its affidavit in support, literally regurgitated the statement of claim. Due to the simplicity of the case and facts, wherein the appellant had no defence to this action, the respondent had alleged that this was a well suited case to be disposed off summarily. In the grounds of judgment, the learned judge had found for a fact that the RM1 million had already been released to the vendors. During the appeal there was further admission of that release.

[7] Pursuant to this summary judgment application, the appellant in its affidavit in reply averred that the transaction was in reality a transaction to buy a piece of land with a house on it, owned by Sparkling Gateway Sdn Bhd, though it bespoke of a sale and purchase of the shares of the latter company. The consideration sum was RM3 million. The RM1 million, admitted to have been accepted by the appellant, was a supposed reimbursement sum advanced by the vendors to the respondent for the renovation of the house on the land though never actually given. In fact no renovation ever took place. The appellant alleged that the mode of the transaction would lead to savings of stamp duty and real property gains tax for the respondent and the vendors. That being so the transaction was tainted with illegality.

[8] This assertion of the transaction being tainted to start with is without basis, as never did the vendors file any supporting affidavit to support the appellant, nor the assertion substantiated in any way by the appellant. At best it is hearsay and at worse a deliberate fabrication. Since we are more inclined to believe the

latter, we are compelled to state that, in order to save its own neck, the appellant has not hesitated in throwing in into the affray all kinds of excuses for its failure to comply with the undertaking, including dragging the vendors into the mud. The respondent in its affidavit in reply had consistently maintained the same stance as pleaded in the statement of claim and had denied all the audacious allegations. Having sifted the evidence, this panel could not agree more with the finding of the learned High Court judge that the appellant's allegation of the contract being illegal and against public policy was misconceived, and unsubstantiated.

[9] As regards the suggested savings of stamp duty from a tainted transaction such an assertion is odd. It is pertinent to establish that the basic principle of the scheme of the Stamp Act is to impose taxation by making it obligatory, either as a practical necessity, or otherwise to stamp documents of types commonly met within legal and commercial circles. What is stamped is not the transaction but the document of that transaction (*Pernas Securities Sdn Bhd v. The Collector of Stamp Duties* [1976] 2 MLJ 188). What document requires stamping, and the amount, depends altogether on the language of the legislature. Here not only the assertion that the transaction being tainted has not been substantiated, but the statement that stamp duty is saved by reason of the transaction being tainted, goes against the grain of the basic principles of stamp duty law.

[10] In the course of the appeal the appellant had also ventilated that the learned judge had failed to consider that the firm consists of three partners, where two of the partners had no knowledge about the transaction involving one Mr Tan Wai Meng, the respondent and the vendors. Unfortunately for the appellant we also rejected that argument. It is trite that a partnership is a relationship that subsists between persons carrying on business in common with a view to profit, with that relationship governing the rights and duties of the partners and their relationship against the world. Unlike a company, the partnership does not confer any limited liability on the partners, thus making a partner being liable without limit to the debts incurred by the other partners, in the course of that partnership business. Under s. 11 of the Partnership Act 1961 it is statutorily provided for that the liability of any of the partners in a partnership is one of joint liability (see *Guinness Anchor Marketing Sdn Bhd v. Chellam Joe Vetha Thya Singh* [1999] 3 AMR 2735).

[11] A scrutiny of the letter showed it as an irrevocable undertaking. But what is an undertaking? *Black's Law Dictionary* defines it as follows:

> **Undertaking.** A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party. A promise or security in any form.

[12] A promise from this same dictionary is defined as follows:

> **Promise.** A declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing. A declaration, verbal or written, made by one person to another for a good or valuable consideration, in the nature of a covenant by which the promisor binds himself to do or forebear some act, and gives to the promise a legal right to demand and enforce a fulfilment.
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> An express undertaking, or agreement to carry a purpose into effect ... An undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future.
>
> A promise is a manifesto of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made. A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct ...

[13] What can be gauged from the above comprehensive definition is that, for purposes of this appeal, the impugned undertaking is a promise or security given in the course of the arrangement, which binds the appellant in law, for obtaining some concession from the respondent. All the respondent had to do was hand over RM1 million to the appellant as stakeholder's money of which they did. The promise required of the appellant was the return of that stakeholder sum to the respondent, in the event something shall happen, or that something shall not happen, leading to the abortion or termination of the transaction of buying the shares of the company.

[14] The capacity of the appellant when giving that undertaking was one of a professional ie, in the capacity of a solicitor, worthy enough to be entrusted with such a large sum of money. As a solicitor the appellant is also an officer of the court. In light of an honourable background, from which oozed the trust, matched by the undertaking, the payment of RM1 million must have been made pursuant to those factors.

[15] The seriousness of an undertaking cannot be underestimated, especially one given by a member of the legal profession, and unless compelled to honour the undertaking, public confidence and trust on the legal profession will whittle away. Courts take it so seriously that a person may be cited for contempt if an undertaking made to it is breached (*Bhimji v. Chatwani (No. 2)* [1992] 1 WLR 1158). For clarification purposes, say a litigant, to whom documents are produced, undertakes to the court not to use such documents for any other purpose other than those of the proceedings in which they are disclosed, subsequently contravenes that undertaking, the party who acts in breach of the undertaking should be prepared to face the wrath of the court.

[16] Let us look at the current set of facts. Indisputably:

i. the appellant is a solicitor's firm;

ii. the sum of RM1,000,000 had been paid to the appellant as stakeholders;

iii. the appellant had admitted that it would "irrevocably undertake to refund the said sum of RM1,000,000" together with all accrued interest in the event of and upon the abortion or termination of the sale and purchase of all the issued shared capital of Sparkling Gateway Sdn Bhd for any reason whatsoever;

iv. whether there would be any dispute as to whether the said sale and purchase had been lawfully aborted or terminated or otherwise would not be a hindrance to its refund; and

v. here it was not just a mere statement of conferring the respondent the necessary protection in a single sentence but beefing up the conferment of undertaking with all kinds of security.

[17] In *Halsbury's Law of England* (4th edn) vol. 44 at para 255, it is authored:

> **Enforcement of undertakings.** Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor ...
>
> The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible *ab initio* for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even though, after it is given, the client dies or instructs the solicitor not to perform it or changes his solicitor ... (emphasis added)

[18] With the letter of undertaking dated 4 December 2002 so clear, unequivocal and unambiguous, and the appellant having breached the solicitor's undertaking, we agreed with the learned judge that no triable issue had been raised by the appellant. The non-refund of the RM1 million was a clear breach of the undertaking. That being so, with the facts and antecedents as they were, this panel had not hesitated to fully endorse the decision of the learned judge that this was a fit and proper case for summary judgement (*United Mining and Finance Corporation Ltd v. Becher* [1910] 2 KB 296; *In re A Solicitor; Ex Parte Hales* [1907] 2 KB 539; *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267).

[19] These grounds of judgment have been read in draft by my learned brother KN Segara and by my learned sister Heliliah Mohd Yusof, JJCA who are in agreement thereto.

[20] Based on the above reasons we dismissed the appeal with costs and the decision of the High Court affirmed. The deposit went towards account of taxed costs.